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Supreme Court of the United States

OCTOBER TERM, [redacted] 1925.

No. 6[redacted] 163

THE VIRGINIAN RAILWAY COMPANY, *Petitioner*

vs.

A. J. MULLENS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF COUNSEL FOR PETITIONER.

ROANOKE PRINTING CO., INC., ROANOKE, VA.

Supreme Court of the United States

OCTOBER TERM, 1924

No._____

THE VIRGINIAN RAILWAY COMPANY, a Corporation,
Petitioner

vs.

A. J. MULLENS, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

The petition of the Virginian Railway Company, a corporation, respectfully shows to this Honorable Court:

(1) That by deeds dated in the years 1902 and 1904, respondent conveyed to the Deepwater Railway Company, a West Virginia corporation, the predecessor in title of your Petitioner, two strips of land situated in Wyoming County, West Virginia, for a right-of-way for a railroad to be constructed thereon by the said Deepwater Railway Company, and that prior to the year 1906, the said Deepwater Railway Company constructed its roadbed upon said strips of land, and shortly thereafter commenced the operation of a railroad thereover.

(2) That by deed dated the 22nd day of April, 1907, the Deepwater Railway Company conveyed said strips of land together with the railroad constructed thereon to your Petitioner, a Virginia corporation.

(3) That from the date of the said deed in 1907, until the beginning of Federal control on December 26th, 1917, your Petitioner continuously operated its line of railroad over the said strip of land and adjacent to the lands of Respondent without any notice or knowledge, whatsoever, that Respondent claimed that Petitioner's embankments diverted the water upon Respondent's land or in any manner constituted a nuisance.

(4) That on December the 26th, 1917, the United States through the Director General of Railroads took complete possession of the physical properties of your Petitioner, including so much of its roadbed as lay adjacent to Respondent's land, and took over the operation of Petitioner's line of railroad so completely that Petitioner was completely deprived of any control whatsoever over its physical properties, and that such possession of Petitioner's roadbed by the United States continued until March 1st, 1920.

(5) That on the 14th day of June, 1921, Respondent instituted an action against Petitioner in the Circuit Court of Wyoming County, West Virginia, in which he alleged that the high waters of floods occurring in February, 1918, and July, 1919, had been diverted by the embankment forming Petitioner's roadbed upon the neighboring lands of Respondent, and had resulted in damage to Respondent's lands.

(6) Petitioner demurred to the declaration, as-

signing as a ground of demurrer that the said declaration and each count thereof showed on its face that the supposed cause of action arose at a time when the United States Government, acting under the authority of an Act of Congress, had taken possession of and was actually in possession of and operating Petitioner's line of railroad, and for that reason there was no liability upon this Petitioner by reason of the Acts set forth in the said declaration.

The said Circuit Court overruled the said demurrer, and Petitioner excepted to the action of the Court in overruling the demurrer. Thereupon, Petitioner filed a plea of general issue, and at the same time, as is permitted under the West Virginia practice, filed a special plea setting up that the supposed cause of action arose at a time when the United States Government, acting under the authority of an Act of Congress, had taken possession of and was actually in possession of, and operating, Petitioner's line of railroad, and that, therefore, there was no liability on Petitioner by reason of the damages caused by floods occurring during the period of Federal control.

(7) That upon the trial of the case, Petitioner requested said Circuit Court to instruct the jury that there was no liability upon Petitioner for any damages caused by floods occurring between December 28th, 1917, and March 1st, 1920, and that they should find for the defendant for any damages caused by floods occurring between said dates. The said Circuit Court refused said instruction, and said Petitioner excepted to the action of the Court in refusing said instruction.

(8) That the trial of the said case resulted in a

verdict in favor of Respondent and against Petitioner for the sum of $8,000.00.

The Petitioner moved said Circuit Court to set aside said verdict and grant it a new trial, assigning as reasons therefor that the Court had erred in refusing the instruction above set forth, and that under the facts of the case there was no liability upon Petitioner, because the damages proved had accrued during the period when the United States Government, acting under the authority of an Act of Congress, had possession and control of its property, but said Circuit Court overruled said motion for a new trial, and refused to set aside said verdict.

(9) Thereupon, Petitioner applied to the Supreme Court of Appeals of West Virginia for a writ of error and supersedeas to the said judgment in accordance with Sections 11 and 12 of Chapter 135 of the Code of West Virginia; that said Supreme Court of Appeals of West Virginia, deeming the judgment complained of plainly right, by an order entered on March 21st, 1924, rejected the application of Petitioner and refused to grant Petitioner a writ of error. Thereupon, Petitioner moved said Supreme Court of Appeals to reconsider its action in refusing said writ of error, but said Supreme Court of Appeals thereafter on the 27th day of June, 1924, and within three months from the date of presenting this petition, again entered an order refusing a writ of error and supersedeas to said judgment.

(10) That said judgment of the Circuit Court of Wyoming County is a judgment of highest court of the State of West Virginia, in which a decision in the suit

could be had, and that said Court decided against the claim of Petitioner, that under the Constitution and statutes of the United States there was no liability upon Petitioner for damages suffered to Respondent's land caused by the flood water of Slab Fork Creek being diverted upon and over the lands of Respondent by Petitioner's roadbed then under possession and control of the Federal Government.

(11) Petitioner respectfully represents that said Circuit Court of Wyoming County, West Virginia, erred in overruling Petitioner's demurrer to the declaration in refusing the instruction above set out and in overruling Petitioner's motion for a new trial for the reason that the damages complained of was the result of acts of the Federal Government acting under the authority of the laws of the United States, in maintaining said line of railroad during Federal control, and because Petitioner during said time, under the laws of the United States, was excluded by the Federal Government from all control over its roadbed.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the Circuit Court of Wyoming County, West Virginia, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Wyoming County in said case entitled "A. J. Mullens against The Virginian Railway Company, action of trespass on the case," to the end that the said case may be reviewed and determined by this Court as provided by Section 237 of the Judicial

Code as amended, and that your Petitioner may have such other and further relief or remedy in the premises as the Court may deem appropriate and in conformity with the provisions of law, and that the said judgment of the said Circuit Court of Wyoming County in said case and every part thereof may be reversed by this Honorable Court.

THE VIRGINIAN RAILWAY COMPANY,

By W. H. T. LOYALL,
H. T. HALL,
G. A. WINGFIELD,
Its Counsel.

W. H. T. LOYALL,
H. T. HALL,
M. P. HOWARD,
MARTIN & WINGFIELD,
Of Counsel for Petitioner.

STATE OF VIRGINIA,
CITY OF ROANOKE, } to-wit:

H. T. Hall and G. A. Wingfield, both being duly sworn, depose and say that they are counsel for the above named Petitioner, and that the matters and things in the foregoing petition are true to the best of their knowledge, information and belief.

Subscribed and sworn to before me this 14th day of August, 1924.

BERTHA FERS, *Notary Public.*

We do hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay, and that in our opinion the case is a proper one for the issuance of the writ of certiorari prayed for.

H. T. HALL.

G. A. WINGFIELD.

In the Supreme Court of the United States

OCTOBER TERM, 1924

No._____

THE VIRGINIAN RAILWAY COMPANY, a Corporation, *Petitioner*

vs.

A. J. MULLENS, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The facts necessary to a decision of this application may be briefly stated as follows:

The Respondent, by two certain deeds dated respectively in the years 1902 and 1904, conveyed to the Deepwater Railway Company, a West Virginia corporation, two strips of land situated in Wyoming County, West Virginia, for a railroad right-of-way. Prior to the year 1906, the said Deepwater Railway Company constructed its roadbed upon said strips of land, and shortly thereafter commenced the operation of a railroad thereover. By deed of April 22nd, 1907, the Deepwater Railway Company conveyed said strips

of land together with the railroad constructed thereon to your Petitioner, a Virginia corporation. From the date of said last mentioned deed until the beginning of Federal control on December 26th, 1917, the said railroad over the said strips of land was operated by your Petitioner. Respondent made no claim and gave no notice whatsoever to Petitioner that the railroad embankments constructed upon said strips of land diverted the waters of the stream and caused them to flow over and upon Respondent's adjacent land or in any manner constituted a nuisance. The two floods which caused the alleged damages to Petitioner's lands occurred in February, 1918, and July, 1919, at a time when the Federal Government was in the actual physical possession of the Virginian Railway Company's property. The alleged nuisance was created by the Deepwater Railway Company when the railroad was originally constructed. At the time the alleged damages occurred the alleged nuisance was being maintained by the United States Government. Your Petitioner, not being the creator of the alleged nuisance, and not being guilty of maintaining the alleged nuisance at the time the damages sought to be recovered in this action proved, denied liability for the alleged damages.

The question involved is that your Petitioner, being guilty of neither creating the alleged nuisance nor maintaining the alleged nuisance, is not liable for the alleged damages caused thereby. In the trial court this question was raised by demurrer, by plea, by instructions offered and by the motion to set aside the verdict and award a new trial.

ASSIGNMENTS OF ERROR

Your Petitioner assigns as error the action of the trial court in the overruling its said demurrer, in refusing to give instructions offered by your Petitioner, and in overruling your Petitioner's motion to set aside the verdict of the jury and award it a new trial, because in deciding each of these questions the said Court held in effect that your Petitioner was liable in damages for the alleged nuisance, although your Petitioner neither created nor maintained said nuisance.

The Federal question involved is that the alleged nuisance was being maintained at the time the alleged damages to Respondent's lands occurred by the United States Government and not by your Petitioner.

ARGUMENT

The Supreme Court of Appeals of West Virginia having refused an application for a writ of error to the judgment of the Circuit Court of Wyoming County, this Court should review the judgment of said Circuit Court on writ of certiorari.

Under the Code of West Virginia, Chap. 135, Sec. 1:

> "A party to a controversy in any Circuit Court may obtain from the Supreme Court of Appeals or a Judge thereof, in vacation, an appeal from, or a writ of error or supersedeas to, a judgment decree or order of such Circuit Court in the following cases:
>
> "(1) In civil cases where the matter in controversy, exclusive of cost, is of greater

value or amount than $100.00, wherein there is a final judgment or decree or order * * *."

Under Sec. 11 of Chap. 135 of the Code of West Virginia:

> "In a case wherein the Court shall deem the judgment decree or order complained of plainly right and reject it on that ground, no other petition therein shall afterwards be entertained. But the rejection of such petition by a Judge in vacation, shall not prevent the presentation of such petition to the Court when in session."

Chap. 135 West Virginia Code, Sec. 12, provides:

> "The Court or judge to whom a petition is duly presented, if of opinion that the decision complained of ought to be reviewed, may allow an appeal, writ of error or supersedeas, and may stay proceedings either in whole or in part."

The Judgment of the Circuit Court of Wyoming County, therefore, only became final upon the 27th day of June, 1924, the date of the last refusal of the writ of error by the Supreme Court of West Virginia. The statutes of Virginia and West Virginia upon the subject of granting writs of error are practically the same, and this was the conclusion reached by this Court in Andrews against The Virginian Railway Company, 248 U. S. 272.

NO LIABILITY UPON PETITIONER FOR DAMAGES CAUSED BY FLOODS OCCURRING DURING FEDERAL CONTROL

The diversion of a stream by filling in a natural channel is considered a nuisance, and liability therefor is placed on that ground.

McMechen vs. Hitchman-GlenDale Co. 88 W. Va. 633, 107 S. E. Rep. 480.

The rule of law is that liability for a nuisance arises only either from the wrongful act of creating the nuisance or the wrongful act of continuing a nuisance created by others. The mere ownership of property on which there exists a nuisance created by others does not make the owner liable for damages caused by the nuisance. In such cases the owner's liability for damages arises from the failure to abate the nuisance. The purchaser of property on which a nuisance has been created does not become liable until he has been notified to abate the nuisance.

20 Ruling Case Law, Nuisances, Section 14, 15 and 16, page 39 and following.

29 Cyclopedia, Law & Procedure, pages 1203 and 1204.

Case note 27 L. R. A. (N. S.) page 164.

Plumer vs. Harper, 14 American Decisions 333.

Note page 336.

As hereinbefore stated, the two floods which occurred in February, 1918, and July, 1919, are the only

floods which caused any appreciable damages to Respondent's lands. Both of these floods occurred during Federal control, and at a time when the Federal Government was in the actual physical possession of the line of the Virginian Railway. At that time the President had taken possession and control of Petitioner's line of railroad on December 28th, 1917, pursuant to the proclamation of December 26th, 1917 (40 Stat. L. 1733, under the Act of August 29, 1916, Chap. 418, 39 Stat. L. 619 and 645), and was operating the line of railroad through the Director General under the Federal Control Act (Act March 21, 1918, Chap. 25, 40 Stat. at L. 451). The effect of Federal control was to deprive Petitioner of all control, whatsoever, over its property, and to transfer the control of the property of Petitioner to the Government. During the period of Federal Control, Petitioner could do nothing whatever with respect to the maintenance of its physical properties, and consequently, could not have done anything to have prevented the damages caused by the two floods in question.

In Ault vs. Missouri Pac. Railroad Co., 256 U. S. 554, this Court has considered the effect of Federal control under the various statutes providing therefor, and it was held that under the law there was no liability upon railroad companies upon any cause of action arising out of the operation of their system of transportation by the Government.

Again, in N. C. Railroad Co. vs. Lee, 260 U. S. 16, it was held that the Government operated the railroads not as lessee, but under a right in the nature of eminent domain, and that actions for injuries suffered during

Federal control could not be maintained against the railroad.

It is, therefore, respectfully insisted that this action being an action for the maintenance of a structure, which constituted a nuisance, should have been brought, if at all, against the railroad administration, and that no liability arose upon Petitioner for damages arising during Federal Control out of the maintenance of its roadbed.

The question presented here has been before the State courts in one or two cases. In Atlantic Coast Line R. R. Co. vs. Southern Cotton Oil Mills, 129 Va. 323, 106 S. E. 337, the plaintiff's property was damaged by an insufficient pipe or culvert under the railroad causing the empounding of water on the property of the plaintiff. The pipe had been installed by the railroad company prior to Federal Control, but the damages had been caused both prior to Federal Control and during Federal Control. The Supreme Court of Virginia held that the Director General was liable for damages caused by the maintenance of the faulty construction of this pipe.

In Renno vs. Seaboard Air Line R. R. Co., 120 S. C. 7, 112 S. E. 439, the railroad company had constructed a fill with a culvert through the fill to carry off the water. The culvert was not sufficient in size to carry off water in times of freshets, and consequently, a pond was formed along the side of the railroad embankment. A small boy playing in the pond was drowned. The culvert and embankment had been constructed by the railroad company prior to Federal Control. The accident occurred during Federal Con-

trol. The South Carolina Court adhered to the doctrine of attractive nuisances, and consequently, neither the railroad company nor the Director General was liable. There was a motion for a directed verdict on the ground that the cause of action was not based upon any liability of the Director General of Railroads, as a common carrier, and was, therefore, without warrant of law. The Court overruled the motion, holding that the failure of the Director General to abate an attractive nuisance by enlarging the culvert to a proper size, showed a reckless disregard of the rights of children who might resort to the pond for pleasure, and it was, therefore, negligence. The court further held that under Section 10 of the Federal Control Act, the railroad administration was liable for maintenance of this nuisance, and that the railroad company being excluded from the control of its property, was not liable for the maintenance.

It is, therefore, respectfully submitted that the Circuit Court erred in holding that your Petitioner, the Virginian Railway Company, was liable for damages arising out of the maintenance of its roadbed during the period of Federal Control.

W. H. T. LOYALL,
H. T. HALL,
G. A. WINGFIELD,
Counsel for Petitioner.

M. P. HOWARD,
WILLIAMS, LOYALL & TUNSTALL,
MARTIN & WINGFIELD,
of Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1924

No. 619

THE VIRGINIAN RAILWAY COMPANY, *Petitioner*

vs.

A. J. MULLENS, *Respondent*

UPON A PETITION FOR WRIT OF CERTIORARI

Since the brief upon the petition for a writ of certiorari in this case was filed the case of Baggott vs. Southern Railway Company, 300 Fed. 337, has been published, and has just come to our attention. In that case the complainant alleged that the defendant in 1907 negligently constructed a trestle across a river in such a manner that there was not sufficient space for water to pass through the trestle freely when the river rose. The defendant knew that by reason of the changing condition of the ground the water was liable to rise more rapidly and to a greater height year by year and that the defendant, with full knowledge of this condition maintained the trestle in the negligent manner above described, that during the month of August, 1918, the river rose to a great height and by reason of

faulty construction and maintenance of the trestle plaintiff's land was overflowed and his crops damaged. The defendant demurred to the complaint upon the ground, among others, that the cause of action arose during federal control, and that no suit would lie against the railroad corporation but that the suit should be brought against the Director General or Federal Agent appointed by the President.

Judge Cochran sustained the demurrer in an exhaustive opinion which fully discusses the principle applicable to the case and which is absolutely at variance with the decision of the West Virginia Supreme Court in the case at bar.

Respectfully submitted,

W. H. LOYALL,
H. T. HALL,
G. A. WINGFIELD,
Counsel for Petitioner.